Supreme Court of the United States

OCTOBER TERM, 1942.

No. 451.

NORMAN BAKER, PETITIONER,

VS.

WALTER H. HUNTER, SUCCESSOR TO ROBERT H. HUDSPETH AS WARDEN OF UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITION FOR REHEARING WITH BRIEF IN SUPPORT THEREOF.

A. G. BUSH,
Davenport, Iowa,
Attorney for Petitioner.

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PETITION FOR REHEARING.

To the Honorable, the Supreme Court of the United States and the Justices Thereof:

Comes now Norman Baker, Petitioner in the above entitled cause, and presents this his petition for rehearing of the above entitled cause in which his petition for certiorari was denied without opinion on the 16th day of November, 1942, and in support thereof respectfully shows:

That on or about the 16th of November, 1942, this Court denied the petition for certiorari herein and thereby denied Petitioner the protection of his constitutional

rights to a fair trial by a jury free from interference and influence of third persons.

This Court failed to give due consideration to the public importance of the questions presented in said petition and particularly to the effect of establishing as law the rulings of the Tenth Circuit Court of Appeals regarding the duties of marshals and deputy marshals and their communications and associations with a segregated jury.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the judgment of the Circuit Court of Appeals for the Tenth Circuit be upon further consideration reversed.

Respectfully submitted,

A. G. BUSH,
Counsel for Petitioner.

Certificate of Counsel.

I, A. G. Bush, counsel for the above named Norman Baker, do hereby certify that the foregoing Petition for Rehearing of this cause, is presented in good faith and not for delay.

A. G. BUSH,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR REHEARING.

Petitioner cannot ascertain the Court's reasons for denying his petition for certiorari, and is therefore at a serious disadvantage.

We assume the Court thought the questions here involved were not of much importance to the public but were questions which affected only the Petitioner. We believe the Court must have failed to give due consideration to the effect of the decision of the lower court.

If that decision stands, it establishes as law, at least in the Tenth Circuit, that where a jury is segregated by order of the court and placed in charge of bailiffs specially sworn, it is part of the official duties of marshals and deputies, without the knowledge of the judge or defendants' attorneys, to direct the jurors as to their duties; to tell them when a case is one of unusual importance; to tell them when the government has spent large amounts of money in preparing for trial; to warn them against bribery; and to tell them that he does not want any disagreement.

It implies that it is a function of the marshal and his deputies to mingle socially with such segregated jurors at their quarters; to eat meals with them and talk constantly with them while so doing; to drink highballs with them; to play cards with them; to entertain them by arranging a birthday celebration with place cards to be read by each juror; by making trifling presents to the juror whose birthday is being celebrated, accompanied by short speeches—and to relieve the tedium of jury service by pleasant sociability.

It abolishes the common law rule followed by courts generally that a presumption of prejudice arises from

communications and associations of unauthorized third persons with a segregated jury.

If such is the law of the Tenth Circuit, it is contrary to the law in the Eighth Circuit. *Stone* v. *U. S.*, 113 F. 2d 70, where the court said:

> "The object of a jury trial would be subverted if they were allowed to communicate with other persons, or other persons to communicate with them, unless for some purpose of necessity and in the presence of the court.
>
> "Jurors are human and not always conscious to what extent they are in fact biased or prejudiced.
>
> "The *improper communication with the juror* * * * *raises the presumption* that the rights of appellant were prejudiced."

If such is the law in the Tenth Circuit, it violates and is contrary to the principles on which jurors are segregated. Plainly they are segregated for the very purpose of preventing them from mingling and communicating with the parties, the witnesses or third persons generally, including officials other than the sworn bailiffs in whose custody they are placed.

If such is the law of the Tenth Circuit, it is contrary to the law of Arkansas. *Sutherland* v. *State*, 76 Ark. 487, 89 S. W. 462, where the officer in charge of the jury left the jury in charge of another officer not specifically sworn.

It is contrary to the law of South Dakota, *State* v. *Smith*, 56 S. D. 238, 228 N. W. 240, where the court said:

> "He was not a bailiff and his official capacity as sheriff certainly gave him no right or authority to mingle in any fashion with the jurors or to have anything whatever to do with them."

To the same effect is *State* v. *Osler*, 56 S. D. 264, 228 N. W. 251, where it was said:

> "The sheriff was not sworn in as a bailiff and had of course no right whatever to mingle with the jury in any way."

If such is the rule of the Tenth Circuit, it is contrary to the law of Wisconsin (*Shefelker* v. *First National Bank of Marion*, 212 Wis. 659, 250 N. W. 870; *LaValley* v. *State*, 188 Wis. 68, 205 N. W. 412, and *Village of Bangor* v. *Hussa Company*, 208 Wis. 191, 242 N. W. 565).

It is contrary to the law of Pennsylvania and of Massachusetts. *Com.* v. *Fisher*, 226 Pa. 189, 75 Atl. 204, which quotes from *Com.* v. *Roby*, 12 Pick. 496, saying:

> "Where the jury have had communications unauthorized there, inasmuch as there can be no certainty that the verdict has not been improperly influenced, the proper and appropriate mode of correction or relief is by undoing what has thus improperly and may have been corruptly done."

Also:

> "They must be kept entirely aloof and free from contact or communication with other parties than the bailiffs who have them in keeping during the trial."

Neither at common law nor by statute of the United States or of the State of Arkansas are marshals given any official duty to perform any services for a segregated jury except such as the court directs.

In the case at bar, the court directed the marshal to procure quarters for the jury, but there is no evidence whatever and no claim has been made either on the part of the government or on the part of the marshal himself that the court gave him any instructions to tell the jury what their duties were or to give them any warning or orders to refrain from associating with third persons. The judge himself gave them their orders at every adjournment in that respect, as his duty required (Rec. 223).

Neither is there any claim by the marshal or by counsel for the government that the court ordered or required

the marshal or his deputies to visit with the jurors socially at their quarters, to eat with them, to converse constantly during the meals, to entertain them with presents, place cards and presentation speeches, to accompany them to their quarters after meals and drink intoxicating liquors with them and play cards with them during the evening, or that the court even knew of such doings.

The only argument which either counsel for the government or for the Tenth Circuit Court of Appeals made in justification of such conduct was that petitioner did not introduce any evidence to show that the jurors were in fact influenced by that conduct to render a verdict against him.

What could be more obvious than that the friendly communications and associations shown by the law-enforcing officers of the government would have a natural tendency to breed a feeling of favor for the government they represented. The marshal and his deputies are indisputably law-enforcing officers of the government.

As said in the *Stone case, supra:*

> "Jurors are human and not always conscious to what extent they are in fact biased."

What possible way was open to Petitioner to demonstrate that the jurors were biased in favor of the government by the conduct in question other than the natural inferences or presumptions that as a matter of common knowledge, attend all human relations?

Friendliness breeds friendliness just as surely as enmity breeds enmity. The friendly social relations, acts and communications were shown without dispute.

The law itself closes the mouths of the jurors as to matters which inhere in their verdict. By settled rules they could not testify whether their minds were influenced by the kindly associations and ministrations of the deputies. VIII Wigmore on Evidence (3d Ed.), Sec. 2349, p. 668, where it is said:

"The verdict as uttered is the sole embodiment of the jury's act, and must stand as such without regard to the motives or beliefs which have led up to their act.

"A juror cannot impeach his verdict."

Also Sec. 2350, p. 678; *State* v. *Lindeman*, _____ N. D. ____, 254 N. W. 276, 93 A. L. R. 1442, and Annotation, 93 A. L. R. 1449.

The government's contention and the finding of the Tenth Circuit Court of Appeals that during the entire two evenings of the meals and the card games and during the other associations during the two weeks of the trial, no conversation was had with reference to the case which the jury was then trying, obviously does not go far enough to show that the kindly ministrations and communications of the deputies did not produce the favorable attitude on the part of the jurors toward the government, which such kindly acts, conduct and communications naturally would produce.

This Court can take judicial knowledge of human nature and of psychology. We submit that every one of you is familiar with countless instances in actual life where kindly acts and social contacts have produced a friendly attitude toward the actors and either the conscious or unconscious desire to favor the actors.

We ask you to consider these facts in reverse. Assume that employes of the defendant arranged a birthday party for one of the jurors with presents, entertaining place cards and short speeches, assume that these employes had eaten at least two meals with the jurors and conversed with them constantly during the meals; assume that they had gone to the jurors' quarters after the meals and joined them in drinking highballs either before or after the meals during the entire evening.

In the light of the Sinclair case,[1] what would have been your judgment in a case where such conduct on the

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[1]*Sinclair* v. *U. S.*, 279 U. S. 749, 73 L. Ed. 939, 49 S. Ct. 471.

part of defendants' employes had resulted in their being convicted and sentenced to imprisonment for contempt of court?

If it would have been contempt of court for defendants' employes to do these things which the government's employes did do, it must have been contempt of court for the government's employes to do them, unless they had some official duty.

Most important of all is the fact that if such is the law of the Tenth Circuit, it is *contrary to the settled principles relating to segregation of jurors and to fair trials.*

In your decisions you have stressed the importance of maintaining the jury system on a plane which would prevent suspicion on the part of the defendants or on the part of the public as to the fairness of a trial.

In the Mattox case[2] it is said:

> "It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of *suspicion* that the administration of justice has been interfered with *be tolerated.*"

Also:

> "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are *absolutely* forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear."

The court referred to the Knapp case[3] where it was held that the mere presence of an officer during the deliberations of the jury absolutely vitiates the verdict without regard to whether any improper influences were actually exerted over the jury or not.

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[2]*Mattox* v. *U. S.*, 146 U. S. 140, 36 L. Ed. 917-921.

[3]*People* v. *Knapp*, 42 Mich. 65.

In the *Sinclair case, supra,* the court said:

> "The test, therefore, is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty."

Also:

> "The situation is controlled by the reasonable tendencies of the acts done."

Also:

> "Here again not the influence upon the mind of the particular judge is the criterion, but the reasonable tendency of the acts done to influence or bring about the baleful result is the test. * * * The wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been influenced in a particular case."

In *Betts* v. *Brady,* 86 L. Ed. (Adv. Sheets), page 1116, the court said:

> "The 14th Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right."

and while the court affirmed the sentence in that case, a strong dissenting opinion by Mr. Justice Black, concurred in by Mr. Justice Douglas and Mr. Justice Murphy, quoted the statement just made and held that defendants' trial had been offensive to those fundamental ideals. To paraphrase Mr. Justice Black's quotation from the Supreme Court of Wisconsin, would it not be a mockery to secure to a defendant solemn constitutional guaranties for a full and fair trial and yet subject a segregated jury to the inevitable influence of social contracts with employes of the government during the trial of the case—eating, drinking, playing cards and conversing continuously.

In *U. S.* v. *Dressley,* 112 F. 2d 972, certain finger print cards were offered in evidence and the jury allowed

to take them to its room. On the back of the cards was contained the "criminal history" of the defendant. It was not shown that the jury considered or read or even saw the criminal history in question, but the judgment of conviction was set aside and the court said:

> "On the basis of the record before us, it is impossible to say that the jury was not substantially influenced by the information which was improperly before it."

So, in the case at bar, it is impossible for you to say that the jury was not influenced by the flagrant violation of the legal principles which forbid association of third persons with a segregated jury, except for the purposes of necessity and with the knowledge and consent of the court, both of which were totally lacking here.

What would the public think as to the fairness of a trial in which employes of one of the parties were allowed to mingle and communicate with a segregated jury and eat and drink and play cards with them as shown in this case?

The lower court, with a commendable desire to retain public respect for jury trials and to protect the lady and other deputies, failed to mention the ladies' drinking highballs with the jurors and minimized the extent of their sociability. But we contend that the constitutional rights of defendant to liberty are more important than to shield the marshal and his deputies from just criticism.

The facts are shown without contradiction. The ladies by their own testimony did engage in drinking highballs (Rec. 282, 333, 335, and see Bradley, Rec. 422). At least one of the jurors understood that the marshal's communications to them were designed to warn them against bribery (Rec. 223). What could be more prejudicial than to instill into the minds of the jurors the thought that defendants might try to bribe them? The thought of bribery was the very thing that vitiated the verdict in the Stone case( ).

Would all these things increase or destroy public belief in the fairness of the trial? If you took a Gallup poll on this subject, ninety-nine per cent of the votes would be that such things were unfair.

Is it possible that any defendant in a criminal case would fail to suspect that the results of the conduct shown would be to create friendliness and bias toward the government with the consequent unfavorable tendency toward the defendant?

If you yourselves were the defendants, or the attorneys for the defendants, would you consent to deputy marshals' eating, drinking, playing cards and mingling and communicating freely with a segregated jury for hours at a time?

If you were a party or attorney for one of the parties, even in a civil case, would you believe you had had a fair trial if an intelligent, competent lady secretary, bookkeeper or other employe of the other party had been allowed to mingle with the segregated jury and converse with them for hours at a time or if any of the employes of the other party had been allowed to so mingle with the jury, to eat, drink, play cards and make merry with them?

We use the term "make merry" deliberately and advisedly. What is the purpose of drinking highballs socially except merry making? What is the purpose of a birthday dinner party with humorous place cards, humorous presents and brief presentation speeches except merry making? (Rec. 337.)

We disclaim any thought that the things done in connection with this jury would have been improper at a wedding or a night club or any social party, but we do contend most emphatically that they were entirely improper when done in connection with a segregated jury and we believe upon deliberate consideration, if time will permit you to deliberate, your conscience will compel you to agree with us.

What place have such things in the deliberations of a jury to determine whether to deprive a fellow citizen of his liberty for a long term?

If you persist in your denial of certiorari in this case, you open a wide door to the deliberate, intentional wide spread use by the prosecution of a half dozen or more deputy marshals as social adjuncts of the prosecution.

That some prosecuting attorneys will be eager to use such influences is clearly shown by what prosecuting attorneys have done in the past, as illustrated in Cain's "Sensational Prosecutions and Reversals," 7 Notre Dame Lawyer 1.

Moreover, even though a prosecuting attorney were too ethical to sanction such conduct, still the marshal and his deputies are law enforcing officers of the government. In many cases they are instrumental in bringing the defendants to trial and *desire* a conviction. Your denial of certiorari certainly opens a way for them to exercise a secret influence, unrecognized even by the jurors themselves, but none the less potent. That the danger of such conduct is *not imaginary* is shown by the many cases of such misconduct cited in the annotation to *Emmert* v. *Ohio*, 90 A. L. R. 243-252.

It may be that the court regarded this as an isolated case and that there would be no probability of a recurrence of deputies' eating, talking constantly, drinking liquor and playing cards with jurors, but we ask the Court to notice the undisputed testimony of Deputy Mallett herself who said that with reference to the Baker jury "her practice did not differ only in this respect—I didn't see as much of them—wasn't with them as much as I am usually" (Rec. 284).

Referring to the meals eaten with the jurors she said, "I tried to be pleasant" (Rec. 293).

Also:

"Q. Did you talk with the jury any?
A. Constantly.

Q. They talked to you constantly?

A. Yes, sir I would not have had dinner with them if they hadn't" (Rec. 284).

Also, she said she was under the impression that she had a perfect right to wait on the jury and visit with them and that it was her duty and practice to do so.

"Q. That has been your practice with all other juries?

A. Yes, sir" (Rec. 298).

Sooner or later this Court will have to define the duties of marshals and their deputies with relation to segregated juries. The present case is a proper one in which to determine whether the duties of the marshal and his deputies are limited to providing room and board and other necessaries for the jury, or whether they extend to wholly unnecessary communications and associations calculated to relieve the lonesomeness of the jurors and the monotony of service on a segregated jury—associations and communications which this court has definitely forbidden to third persons generally.

The enlarged scope of habeas corpus is well set out in *Coates* v. *Lawrence*, 46 F. Supp. 414-420, where the court said:

> "At common law an officer's return to a writ of habeas corpus showing that the prisoner was held under final process based upon a judgment or decree of a court of competent jurisdiction closed the inquiry. So it was in this country under the judiciary act of February 5, 1867, Ch. 28, 14 Stat. 385, now embodied in 28 U. S. C. A., Sec. 453, extended the writ to all cases of persons 'in custody in violation of the Constitution or of a law or treaty of the United States.' * * * 'Habeas corpus cuts through all forms and goes to the very tissue of the structure.' "

We submit that, having shown unauthorized acts and conduct by the deputies, the natural effect of which

would be to bias the jurors in favor of the government, Petitioner has gone as far as reason requires and as far as the rules of evidence regarding the testimony of jurors permit.

If such acts and conduct deprived him of a fair trial, they violated his constitutional rights to due process of law which demands a fair trial and the case comes squarely within the provisions of Title 28, Section 451; that "the Supreme Court and the district courts shall have power to issue writs of habeas corpus" and Section 453 which provides that the writ of habeas corpus shall extend to a prisoner in jail if "he is in custody in violation of the Constitution," and the Court shall dispose of him as reason and justice require.

We respectfully submit that reason and justice require that the sentence and commitment of Petitioner be voided to the end that he may have a new trial in which his constitutional rights will be duly guarded.

Respectfully submitted,

A. G. BUSH,
Counsel for Petitioner.